Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

DANIEL OPOKU MENSAH,
Petitioner,

v.

ERIC H. HOLDER JR., ATTORNEY GENERAL OF THE UNITED STATES; DEPARTMENT OF HOMELAND SECURITY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 24, 2009

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QUESTION PRESENTED FOR REVIEW

Whether a federal appeals court has jurisdiction to review the Board of Immigration Appeals' nondiscretionary duty to evaluate in a lawful manner the impact of the removal of the alien on the alien's United States citizen children as part of the Board's discretionary determination whether to grant the alien the relief of cancellation of removal.

RULE 14(B) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition for is as follows:

1. Daniel Opuku Mensah who is the petitioner before this Court, was also the petitioner before the United States Court of Appeals for the Sixth Circuit and the respondent before the Board of Immigration Appeals and Immigration Court.

2. Eric Holder, Attorney General, who is the respondent on behalf of the United States of America before this Court was also the respondent on behalf of the United States of America before the United States Court of Appeals for the Sixth Circuit. The Board of Immigration Appeals whose final order was the subject of Mr. Mensah's petition for review to the Sixth Circuit is a part of the Executive Office of Immigration Review, an office within the United States Department of Justice which is under the direct supervision of General Holder.

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PETITION FOR A WRIT OF CERTIORARI

Daniel Opuku Mensah, a native and Citizen of Ghana, respectfully petitions for a writ of certiorari to review the opinion and judgment below of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated June 4, 2008, has never been officially reported. There are no non-official citations. The opinion is set forth at App. 1a.

The decision and final order of the Board of Immigration Appeals that was the subject of petition for review to the Sixth Circuit also has never been officially reported. The case number of this matter before the Board of Immigration Appeals is A76-898-266. The opinion is set forth at App. 3a.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on June 4, 2008. Mr. Mensah filed a motion for rehearing on July 15, 2008. The motion for rehearing was denied on March 26, 2009. This petition is timely under 28 U.S.C. § 2101(C) and Supreme Court Rule 13.1 because it is being filed within 90 days of the denial of the motion for rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are provisions of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B) establishing the limits on the jurisdiction of the courts of appeals to review claims for discretionary relief and 8 U.S.C. § 1229b(b)(1) establishing the standards for grants of cancellation of removal. The relevant statutory provisions are reproduced at App. 29a-30a.

STATEMENT OF THE CASE

This case arises from the Board of Immigration Appeals' January 25, 2007 final order affirming the November 8, 2005 decision of the Immigration Court, denying Mr. Mensah's claim for cancellation of removal based upon the extreme hardship that Mensah's United States citizen children would suffer if he is removed to Ghana.

Mr. Mensah is a native of Ghana. He has an associates degree in accounting and ninety seven credits toward his bachelor's degree. He works for a large Columbus law firm as a billing associate. (CAR 81). He has paid his United States income taxes from 1992 to present. (CAR 82).

He has two United States citizen children: one boy born December 8, 1994 and a girl born September 6, 1998 (CAR 79). He and his wife own their own home in Columbus, Ohio (CAR 80). Mr. Mensah is active in his church and came to this country fleeing from religious persecution that he suffered in Ghana. (CAR 85). His parents were granted asylum in England based upon religious persecution. (CAR 86).

In denying Mr. Mensah's claim for cancellation of removal, the Immigration judge agreed that Mr. Mensah had established the requisite 10 years physical presence in the United States and that he was a person of good moral character. (CAR 51). The immigration court ruled, however, and the Board of Immigration Appeals affirmed, that Mensah had failed to establish that his removal would create an exceptional and extremely unusual hardship to his United States Citizen children.

Mr. Mensah filed a timely appeal to the Board of Immigration Appeals. On January 25, 2007 the BIA issued its final order affirming the immigration judge's denial of withholding of removal and specifically affirmed the lawfulness of the manner in which the immigration court considered the potential hardship on Mr. Mensah's citizen children that would accrue to them from his removal.

Mr. Mensah then filed a timely petition for review from the BIA's final order to the United States Court of Appeals for the Sixth Circuit pursuant to 8 U.S.C. § 1252. The Sixth Circuit affirmed the BIA on June 4, 2008. On March 26, 2009 the Court of Appeals issued its decision denying Mr. Mensah's motion for rehearing.

Review by certiorari to the U.S. Court of Appeals for the Sixth Circuit is sought pursuant to 28 U.S.C. § 2101(C) and 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE PETITION

In *Billeke-Tolosa v. Ashcroft*, 385 F. 3d 708, 711 (6th Cir. 2004), the Sixth Circuit itself has recognized

that a majority of the federal courts of appeals have held that the preclusions on the review of administrative discretion such as contained in 8 U.S.C. § 1252(a)(2)(B) involving the denial by the BIA of discretionary relief from removal do not prevent the federal courts from reviewing the lawfulness of factual findings and legal reasoning upon which the discretionary decision as to whether to grant or deny cancellation of removal is based. Indeed, the following Circuits have all adopted that approach: *Mickeviciute v. INS,* 327 F.3d 1159, 1164 n. 4 (10th Cir.2003); *Okpa v. INS*, 266 F.3d 313, 317 (4th Cir.2001); *Najjar v. Ashcroft*, 257 F.3d 1262, 1297 (11th Cir.2001); *Bernal-Vallejo v. INS*, 195 F.3d 56, 62 (1st Cir.1999); *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir.1997). Only the Seventh Circuit, in *Pilch v. Ashcroft*, 353 F. 3d 585, 587 (7th Cir. 2003), and the Sixth Circuit in the case at bar have suggested that the fact finding and legal reasoning that support an exercise of discretion should also be precluded from meaningful judicial review.

Other than *Pilch*, *supra*, and the case at bar, the federal courts have actively reviewed the underlying justification for an exercise of administrative discretion where there is law to apply in order to determine if the exercise of discretion has a lawful basis. Indeed, this Court has repeatedly recognized that the courts have jurisdiction to determine whether an agency has complied with its own rules where the rules are intended to confer procedural or other benefits to protect individuals in the face of otherwise unfettered administrative discretion. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); *Service v. Dulles*, 354 U.S. 363, 372, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957). *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39, 90 S.Ct.

1288, 25 L.Ed.2d 547 (1970). *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S.Ct. 499, 98 L.Ed. 681 (1954).

Pursuant to this rule that agencies must follow their own binding rules and precedents, the Sixth Circuit in *Billeke-Tolos*, *supra*, at 711-712 held that it did have jurisdiction to review whether the BIA's discretionary decisions complied with the standards established by the BIA's own precedent decisions. *Accord, Hernandez v. Ashcroft*, 345 F. 3d 824, 846 (9th Cir. 2003). The BIA's own procedural rules require it to conduct its adjudications in a manner consistent with its own prior precedent decisions. 8 C.F.R. Section 1003.1(g).

With regard to the issue in controversy in this case, i.e., the extent to which harm will accrue as a result of the alien's removal to the aliens' U.S. citizen the BIA has issued several precedent decisions proscribing the manner in which it evaluates the issue.

In *Matter of Recinas*, 23 I & N Dec. 467 (BIA 2000), the Board held that where the alien had no severely negative factors to support removal and where U.S. citizen children were wholly dependent for their life and support upon the parent who is being removed, the children had no previous contact with the country to which they would have had to go with the removed parent, and the removed parent had no family support structure to support the U.S. citizen children in the country to which removal would occur, cancellation of removal should be granted.

Furthermore, in *Matter of Monreal*, 23 I & N Dec. 56 (BIA 2001), the Board emphasized that the

hardship that would occur does not have to rise to the level of "unconscionable" suffering in order to constitute extreme hardship. In that decision the Board also emphasized that all of the forms of hardship must be evaluated in their totality, not individually, as did the IJ and the Board below in this case.

In addition, even in *Matter of Pilch*, 21 I & N Dec. 627, 632 (BIA 1996), the case which the IJ repeatedly cited below, the Board held that it was absolutely necessary to give "close attention" to the impact of removal on U.S. citizen children. The Board also emphasized in that case that the inquiry concerning the hardship to children is whether "these problems do [or do not] materially differ from those encountered by other children who relocate with their parents". In *Pilch*, *supra*, the comparison was between U.S. and European health care and educational systems. Not surprisingly, the Board found that the adjustment the children would have to make to Europe was not an extreme hardship.

But in this case, the country of adjustment is Ghana, a country with a whole range of diseases (such as an out of control AIDS epidemic that is common throughout Africa) and lack of treatment for those diseases when compared to what a U.S. child would face in this country. But neither the IJ nor the Board paid "close attention" to the facts as to what these children would face with public health and education issues in Ghana rather than the abstract manner that was employed below. Thus, this case is similar to *Reyes-Melandez v. INS*, 342 F. 3d 1001 (9th Cir. 2003), where the Ninth circuit reversed and remanded a denial of cancellation of removal because the IJ had

failed to seriously consider the hardship which would accrue to the alien's U.S. citizen children.

But rather than review whether the manner in which the BIA considered the impact on his children of Mr. Mensah's removal was consistent with prior BIA precedent, the Sixth Circuit in its decision in this case dismissed the significance of its duty to assure that the BIA complies with its own precedents. Instead the Court in this case declared that it was not going to "second guess every choice the agency makes about how to apply" its precedents. (App. 27a). Mr. Mensah respectfully suggests that assuring compliance with binding administrative precedent is a more serious analytical task than mere "second guessing".

As a result, Mr. Mensah suggests that where a court of appeals abandons its duty to protect the interests of American citizen children by assuring that their best interests are considered by the immigration bureaucracy, it is appropriate for this Court to address the failure of the Sixth Circuit to assure that protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3188

[Filed June 4, 2008]

DANIEL OPOKU MENSAH,	)
	)
Petitioner,	)
	)
v.	)
	)
MICHAEL B. MUKASEY, Attorney General of the United States; DEPARTMENT OF HOMELAND SECURITY,	)
	)
Respondents.	)

ON PETITION FOR REVIEW FROM A
FINAL ORDER OF THE BOARD OF
IMMIGRATION APPEALS

ORDER

Before: DAUGHTREY and MOORE, Circuit Judges; DUGGAN, District Judge.*

Daniel Opoku Mensah, through counsel, petitions this court for review of the final order of removal issued by the Board of Immigration Appeals (BIA) affirming the denial of his application for cancellation of removal and order of removal against him by the immigration judge (IJ). Both parties have waived oral argument and, upon examination, this panel has unanimously agreed that oral argument is not necessary. Fed. R. App. P. 34(a).

On or about October 19, 1991, Mensah, a native and citizen of Ghana, was paroled into the United States. But as a result of his parol status expiring, the IJ ordered his removal. Although Mensah had initially applied for relief from removal through asylum, he later withdrew this application and instead pursued relief through an application for cancellation of removal. On November 8, 2005, the IJ held a merits hearing and afterwards rendered an oral decision and order denying the application for cancellation of removal on the basis that Mensah had failed to establish that, as a result of his removal, his two U.S.-citizen children would suffer "exceptional and extremely unusual hardship," a requirement under 8 U.S.C. § 1229b(b). The IJ did not consider whether removal would cause "exceptional and extremely unusual hardship" to Mensah's wife because she does not qualify as a United States citizen or alien lawfully admitted for permanent residence under 8 U.S.C.

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* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

§ 1229b(b)(1)(D). He thereafter filed an appeal to the BIA, which affirmed the IJ and dismissed the appeal on January 25, 2007. Mensah timely filed a petition for review in this court.

Mensah argues that the BIA erred in affirming the decision of the IJ on grounds that, based on the evidence in the record, he met his burden of showing "exceptional and extremely unusual hardship" under 8 U.S.C. § 1229b(b) and, therefore, his application for cancellation of removal should have been granted. He also argues that the judgment against him should be vacated and remanded to the IJ on grounds that he was denied a full and fair hearing, a violation of his due process rights.

As to whether Mensah met his burden of proof on the "exceptional and extremely unusual hardship" element of 8 U.S.C. § 1229b(b), this court cannot review the issue because 8 U.S.C. § 1252(a)(2)(B) "specifically divests jurisdiction of a court to review judgments regarding the granting of discretionary relief, including the cancellation of removal." *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005).

However, this court does have jurisdiction to review Mensah's due process claims. The Fifth Amendment's guarantees of due process do extend to aliens in deportation proceedings, entitling them to a full and fair hearing. *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001). These claims are reviewed de novo. *Hassan v. Gonzales*, 403 F.3d 429, 435 (6th Cir. 2005). But an alien does not have a due process right to cancellation of removal. *See Sad v. INS*, 246 F.3d 811, 819-820 (6th Cir. 2001).

"In removal proceedings, an alien is entitled to 'a reasonable opportunity . . . to present evidence on the alien's own behalf.'" *Hassan*, 403 F.3d at 435 (citing 8 U.S.C. § 1229a(b)(4)(B)). "Evidentiary matters in immigration proceedings, however, are not subject to the Federal Rules of Evidence, and we review evidentiary rulings by IJs only to determine whether such rulings have resulted in a violation of due process." *Id.* (internal citation omitted). "A violation of due process occurs when 'the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" *Id.* at 436 (internal citation omitted). This occurs where an IJ does not behave as a "neutral fact-finder," but instead acts as a "partisan adjudicator." *Id.* (internal citation omitted). Nevertheless, an IJ is "afforded broad discretion to control the manner of interrogation in order to ascertain the truth." *Id.* (internal citation omitted).

Mensah argues that he was denied a full and fair hearing because the IJ failed to: (1) permit Mensah's 12-year-old son, a U.S. citizen, to testify; (2) permit counsel to give closing argument; (3) fully address the current conditions in Ghana; (4) address the hardship of separation of Mensah's young children from their mother; (5) address how deportation of Mensah would affect the two-income family dynamic; and (6) address the threat of female genital mutilation on Mensah's young daughter. Upon examination of these claims, we find that Mensah's right to a full and fair hearing was not violated.

First, with regard to Mensah's argument that his 12-year-old son was not allowed to testify, although due process afforded Mensah the right to present

evidence, the record shows that he neither objected to the IJ's ruling that the son could not testify nor proffered the substance of his son's testimony and why it would have been prejudicial to preclude such testimony. But even if it were error on the IJ's part to not allow the son to testify, Mensah has failed to show prejudice. *See Gishta v. Gonzales*, 404 F.3d 972, 979 (6th Cir. 2005) ("To prevail on a due process challenge to deportation proceedings, [an alien] must show error and substantial prejudice."). (internal citation omitted). "A showing of prejudice is essentially a demonstration that the alleged violation affected the outcome of the proceedings." *Id.* (internal citation omitted). Mensah has not demonstrated how the preclusion of his son's testimony affected the IJ's decision to deny the application for cancellation of removal.

As for the claim that the IJ did not allow counsel to give closing argument, the record clearly shows that closing argument was not requested by either party. Again, the IJ did not commit error but, even if so, Mensah has failed to explain how and why it affected the decision of the IJ, aside from noting that, as a result, Mensah's attorney did not have an opportunity to explain the hardships that would occur to Mensah's family if he were removed. This argument is without merit since it is clear from the IJ's order that she understood – via the testimony given during the hearing – what hardships Mensah's family would suffer as a result of removal and took this into account.

Finally, regarding the claim that the IJ "failed to address a myriad of facts within Mr. Mensah's case," the IJ's order unequivocally shows that she did in fact address the current conditions in Ghana. As for the

hardship of separation of Mensah's young children from their mother, the record shows that Mensah testified that, if he were removed to Ghana, his wife and children would go with him. Consequently, there were no facts regarding the separation of Mensah's children from their mother in the record for the IJ to have considered. *See* 8 U.S.C. § 1229a(c)(1)(A) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing."). With respect to how deportation of Mensah would have affected the two-income family dynamic, the IJ's order clearly addressed Mensah's employment possibilities in Ghana and noted there was no testimony as to whether Mensah's wife would be unemployed or underemployed in Ghana. In fact, Mensah chose to not have his wife testify. She could have shed light on how the two-income family dynamic would have been affected, along with her ability to find employment in Ghana. Finally, during the hearing, Mensah never raised the threat of female genital mutilation on his young daughter if she were to return to Ghana with him. *See* 8 U.S.C. § 1229a(c)(1)(A).

We conclude that Mensah did not suffer a due process violation and was not denied a full and fair hearing. The record shows that he was not prevented from reasonably presenting his case and there is no evidence that the IJ acted as a "partisan adjudicator."

For the reasons set forth above, we deny the petition for review.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: JAN 25 2007

File: A72 020 148 - Cleveland

In re: DANIEL OPOKU MENSAH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mark M. Nesbit, Esquire

ON BEHALF OF DHS: Wayne F. Benos
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent is a 41-year-old married male, a native and citizen of Ghana. We will dismiss his appeal of the Immigration Judge's November 8, 2005, decision.

The respondent testified that he has two children born in the United States, one in 1994, and one in 1998

(Tr. at 19). He indicated that he bought a home in the United States, and has approximately $28,000 in equity in it. (Tr. at 20). The respondent stated that if he went to Ghana his wife and children would accompany him, because they do not have any immediate family in the United States. The respondent stated that his parents are in London as asylees, and that he has one sister in the Ivory Coast (Tr. at 25, 26). The respondent testified that the health and educational systems in Ghana are not as good as those in the United States (Tr. at 27). He also stated that he was trained in accounting in the United States, (Tr. at 20), but the accounting system in Ghana is different from the American system, and he expressed concern about finding employment in this field in Ghana (Tr. at 29).

The Immigration Judge found that the respondent met the continuous physical presence and good moral character requirements necessary to qualify for cancellation of removal. The Immigration Judge noted that she weighed all the evidence, both individually and cumulatively on the issue of hardship, and concluded that the respondent had failed to establish exceptional and extremely unusual hardship to his United States citizen children if he were removed to Ghana. (I.J. at 7).

The Immigration Judge noted the respondent's concern about possible unemployment in Ghana, but found that he has transferrable skills that he could use in Ghana. She also observed that economic detriment due to adverse conditions in the home country are normal occurrences, and do not justify a grant of cancellation of removal in the absence of other substantial equities (I.J. at 8). The Immigration Judge

also noted that the respondent's wife works in the health care industry, and there has been no testimony that she would be unemployed or underemployed. In addition, she pointed out that the equity the respondent has in his home could assist the family in their relocation to Ghana (I.J. at 8, 9). The Immigration Judge noted that the respondent, his wife and children enjoy good health. She also recognized that the family has strong religious and community ties in the United States, but that any emotional hardship as a result of having to leave the United States would not provide the requisite level of hardship to justify a grant of cancellation of removal. She therefore denied relief.

On appeal, the respondent argues that the Immigration Judge erred by failing to address the potential relief the respondent could receive through his wife's pending asylum case. He also asserts that the Immigration Judge did not consider the hardship of separating the family. He contends as well that the Immigration Judge erred by refusing to allow the respondent's 12 year-old son to testify. He further argues that the Immigration Judge failed to address the present country conditions in Ghana, or the threat of female genital mutilation (FGM) on his young daughter.

We do not agree with the respondent's contention that the Immigration Judge erred in her conduct of the hearing and in her decision. We first note that the record reflects that the respondent withdrew the asylum application he filed, and indicated that he was seeking the relief of cancellation of removal and voluntary departure in the Immigration Court (Tr. at 6). While the record contains the respondent's wife's

asylum application (Group Exh. 7), a review of the transcript of proceedings does not indicate that the respondent presented the issue of benefits he could receive through his wife's asylum application to the Immigration Court to consider. Moreover, we find the respondent's wife's asylum application not to be relevant to these proceedings. We note that if there are benefits available to the respondent through his wife's asylum application, said benefits are still available, but they are not a part of this record or this appeal.

We also find that the record reflects that the Immigration Judge addressed and considered all the evidence relating to hardship to the respondent's children that the respondent presented, but this did not include separation of the family. The evidence he put forth related instead to separation from the church community, lack of immediate relatives in Ghana, exposure to the educational system in Ghana, exposure to Ghana's health system, and his economic potential in Ghana. The Immigration Judge considered all of these factors in her decision (I.J. at 9-10), but found that the respondent had not established that his removal would result in exceptional and extremely unusual hardship to his United States citizen children.

We note that the respondent did not object to the Immigration Judge's ruling that his son Denzel, who was 10 years old at the time of the hearing, would not be allowed to testify, and failed to proffer what the substance of such testimony would be (Tr. at 31, 32). He also did not show that he has been prejudiced by the fact that his son did not testify. In addition, we find that the respondent did not attempt to raise the issue of country conditions or FGM with the Immigration Judge. In fact, he declined to have his

wife, the asylum applicant who presumably had knowledge of conditions in Ghana, testify, indicating that her testimony would be redundant of his own (Tr. at 31).

We will dismiss the appeal as we agree with the Immigration Judge that the respondent does not qualify for cancellation of removal because he failed to show that his removal would result in exceptional and extremely unusual hardship to his qualifying relatives, namely his two United States citizen children. For the reasons identified by the Immigration Judge, we agree that while the respondent's removal would adversely affect his family, the level of hardship falls short of the exceptional and extremely unusual standard set forth in section 240A(b) of the Act. *See* I.J. at 7-10); Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ Frederick D. Hess
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT
Cleveland, Ohio

File A 72 020 148

[Filed November 8, 2005]

In the Matter of	)
	)
DANIEL OPOKU MENSAH,	)
	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

CHARGE: Section 212 (a) (7) (A) (i) (I) of the Immigration and Nationality Act – an alien who at the time of admission did not possess valid entry documents.

APPLICATION: Cancellation of removal.

ON BEHALF OF RESPONDENT:

Christina Kleiser
Attorney-at-Law

ON BEHALF OF GOVERNMENT:

Wayne Benos
Assistant Chief Counsel

ORAL DECISION AND ORDER
OF THE IMMIGRATION JUDGE

The respondent is a married male native and citizen of Ghana. The Immigration and Naturalization Service brought these removal proceedings against this respondent pursuant to authority in the Immigration and Nationality Act. The proceedings commenced with the filing of the Notice to Appear with the Immigration Court. See Exhibit 1. The respondent admitted as alleged in this Notice to Appear that he is a native and citizen of Ghana who was paroled into the United States at New York, New York on or about October 19, 1991 and that his parole Status was terminated or expired and as a result he did not possess valid entry documents in accordance with Section 212 (a) (7) (A) (i) (I) of the Immigration and Nationality Act. On the basis of the respondent's admissions and supporting documents in the record I find his removability as charged. The respondent declined to designate a country for removal and Ghana was directed.

He applied initially for relief from removal in the form of asylum. However, that application was subsequently withdrawn. His wife at one point had applied for adjustment of status and he was attempting to glean status through that application. However, the wife is no longer a religious worker and that relief is also unavailable. The only relief before this Court today is that of cancellation of removal. It is

the respondent who bears the burden of persuasion in his application for relief.

The respondent's application for cancellation of removal is in evidence as Exhibits 4 and 5. Prior to the commencement of proceedings the respondent had an ample opportunity to make changes to that application and by swearing and affirming to tell the truth he has incorporated the veracity of his petition to the best of his knowledge.

STATUTORY ELIGIBILITY

In order to establish eligibility for cancellation of removal a respondent has to show his continuous physical presence in the United States for 10 years immediately preceding the issuance of the Notice to Appear. He has to show that he is a person of good moral character for this time period and that his removal would result in extreme and unusual hardship to his qualifying relatives. In this case I can only consider extreme and unusual hardship to the qualifying U.S. citizen children. The elements required to establish extreme and unusual hardship depend upon particular facts and circumstances peculiar to each case. See Matter of Ige, 20 I&N Dec. 880 (BIA 1994).

Factors relevant to the issue of extreme and unusual hardship include a respondent's age, the length of his or her residence in the United States, family ties in the United States and abroad, health issues, economic and political conditions in the country to which the person may be returned, financial status, the possibility of other means of adjustment, the immigration history or the position in the community.

See Matter of Anderson, 16 I&N Dec. 596 (BIA 1978). Relevant factors though not extreme in and of themselves can be considered in the aggregate in order to establish whether extreme and unusual hardship exists. *See* Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986). While political and economic conditions in the respondent's home country are relevant they do not justify a grant of relief unless there are other factors such as advanced age or severe illness which combine to make removal extremely unusually hard on the qualifying relative. See Matter of Anderson, supra.

FACTS

In this particular case the respondent submitted certain documentary evidence in support of his application for cancellation of removal. That documentary evidence includes the respondent's wife's asylum application, his children's records and certificates, the couple's evidence of family home ownership, photographs of the children and then some background material as it relates to country conditions in Ghana. Prior submitted documentation includes documents of birth for the two U.S. citizen children as well as evidence of continuous physical presence in the United States in the nature of fingerprint charts, tax returns from 2001 until 2004, employment letters, school transcripts and letters, church letters and church programs. All of these documents have been carefully considered for this oral decision.

In his written application for cancellation of removal the respondent set forth the facts and circumstances surrounding his claim. He also testified in behalf of his claim. Today the respondent basically told us that he is married and that his wife is here in

the United States and that he married her here in 1993 in New York City. She has a pending asylum application. Two children have been born to this marriage, a boy on December 8th, 1994 and a girl on September 6th, 1998. The children are in grammar school.

The respondent indicated that on December 3, 2004 the couple bought their own home and they have approximately $28,000 in equity. He in 1996 earned an associates degree in accounting. He also has approximately 47 credits from Baruch College in accounting. The respondent works as a billing associate and has done so since February 2nd, 2003. He works full-time and makes approximately $33,000 a year. He has a retirement plan, disability and health plans. His wife also works. However, her health plan covers the two children. She is a nurse's aide. The respondent and his wife have paid taxes. The respondent has paid taxes since 1992. He prior worked as an accounting clerk. He worked at that job initially from March 3, 1992 as a mail clerk and in 1996 he was promoted to an accounting clerk at which time he left the job in August of 2002. His wife works as a nurse's aide from 7 p.m. to 7 a.m. and she works four days a week. This includes three days full-time plus overtime.

The respondent entered the United States in October of 1991. He stated that he came to the United States because there was a lack of religious freedom for him in Ghana. He is a Jehovah's Witness and he practices his faith. The respondent is an elder at the Apostolic Church. He also counsels married people, he preaches, he assists in national conventions and he is financial secretary for the whole region. He also leads a men's fellowship group. The respondent and his wife

and children are very involved in the church and they attend church activities on Tuesdays, Wednesdays, Fridays, Saturdays and Sundays. The respondent has never been arrested.

The respondent indicated that the effect on his children if the family returns to Ghana will be very poor. He indicated that his wife and children would return to Ghana. He stated that it would be difficult to take his children away from the United States as they have no immediate relatives in Ghana other than more distant relatives. The respondent, however, has no immediate family in the United States either. He stated that in 1988 his parents moved to London and they are asylees in England. His sister lives in the Ivory Coast. His children have never been to Ghana.

He stated that he believes the educational system and the health care in Ghana would be substandard. He spoke of his son, Denzil, who is very good in school but has sometimes a little bit of problems with his outspokenness and apparently was suspended for one day for fighting in school. In Ghana the respondent believes the punishment would be much harsher as the child would probably be corporally punished. Respondent indicated that the health conditions in Ghana are substandard. He also indicated that for himself work would be difficult to find as the country is under the British system of accounting. He stated that he has no property in Ghana.

On cross-examination the respondent agreed that his wife works nights to care for the family and that she works a full-time schedule which includes three full-time days of 12 hours as well as an additional overtime day.

ANALYSIS AND FINDING

There is clearly no issue as to the respondent's eligibility for cancellation of removal. In order to establish eligibility for cancellation of removal the respondent has to show continuous physical presence in the United States for 10 years immediately preceding the issuance of the Notice to Appear. I find that the documentary evidence has established the continuous physical presence in the United States.

The second prong of the analysis surrounds the issue of good moral character. I think that there is absolutely nothing adverse in this record to suggest that there is any bad moral character and the issue of good moral character has also been established.

The last analysis of this three-pronged analysis surrounds the issue of extreme and unusual hardship. However, I have been able to weigh all the evidence both individually and cumulatively on this issue of extreme and unusual hardship to the qualifying relatives, that is the USC children, and I find that unfortunately the respondent has failed to establish extreme and unusual hardship.

In order to establish extreme and unusual hardship the Court can look at many different factors. However, in this particular case there appears to be nothing to show that there would be any extreme and unusual hardship suffered by these U.S. citizen children if they are forced to return to Ghana. The respondent has suggested that economically the family would suffer as the family would go back to Ghana to a possible unemployment. The respondent is in accounting as a profession. He stated that the British system is

different from the American system and he probably will not be able to work in this area. However, the respondent clearly has certain transferrable skills that could come to use in Ghana. It bears noting, however, that economic detriment due to adverse conditions in the home country, the loss of employment in the United States or even the loss of a business or a chosen profession in the United States and projected difficulty in finding employment in the home country are normal occurrences of removal and do not justify a grant of cancellation of removal in the absence of other substantial equities of a unique and extenuating circumstance. See Perez v. INS, 96 F.3d 390 (9th Cir. 1996); see Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986); see Majia-Carillo v. United States, 656 F.2d 520 (9th Cir. 1981); see Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981); see also Matter of Anderson, supra.

The respondent's wife is in the health care industry and there has been no testimony that she would be unemployed or underemployed. The respondent's family is not poorly off in the United States. They have approximately $28,000 in equity in their home. Presumably the respondent and his wife could sell their home, pull out their $28,000 in equity in order to assist them in their economic transition when they are relocated to Ghana.

The respondent has indicated that it would be difficult for his family to be separated from the United States. However, it does also bear noting that the respondent has no immediate family in the United States. He has parents that are asylees in England and he has some extended family that lives in Ghana.

This case can be analogized to In re Pilch, Int. Dec. 3298 (BIA 1996). In that case the respondents were a family with children. They owned their own home. They also owned their own business that employed a substantial number of American workers. Despite these facts and circumstances the Court ruled that the respondents did not even establish extreme hardship much less the higher standard of extreme and unusual hardship which is required in this cancellation of removal case.

It is important also to note that separation from friends and family in the United States is a common result of removal. See In re Pilch, supra. Respondents, however, would be reunited with other family members in their home country that could help provide a financial and emotional base to the family. See In re Pilch, supra.

Fortunately the respondent, his wife and his children enjoy good health. There are no extenuating circumstances surrounding the health of these children. It is true that the respondent and his family have strong community and religious ties here in the United States. However, such ties can be established in their home country and the emotional hardship upon separation in this particular case would not amount to extreme and unusual hardship. It is also important to note that even though there are two U.S. citizen children, the fact that respondents have U.S. citizen children does not in and of itself justify cancellation of removal. See Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986).

It is also important to note that the wealthier, the better educated the respondent is the less likely a

finding of extreme hardship much less an extreme and unusual hardship. See In re Log, Int. Dec. 3281 (BIA 1996); see Matter of Kim, 15 I&N Dec. 88 (BIA 1974).

It is also important to note that the fact that medical facilities in the respondent's home country may not be as good as they are in the United States does not establish extreme and unusual hardship for the qualifying relatives. See Matter of Cordero, 19 I&N Dec. 130 (BIA 1984). While the respondent suggested that the children may face difficulty adjusting to life in the parent's homeland these problems are not materially different from those encountered by children who relocate with their parents at a young age. See In re Pilch, supra; see also Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985) and lastly the fact that there are reduced economic and educational opportunities for children in their home country does not establish extreme and unusual hardship. See In re Pilch, supra.

I find that based on all of these facts and circumstances that the respondent's application for cancellation of removal must be denied.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Ghana on all the charges as they appear in his Notice to Appear.

ROXANNE C. HLADYLOWYCZ
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE ROXANNE C. HLADYLOWYCZ in the matter of:

DANIEL OPOKU MENSAH

A 72 020 148

Cleveland, Ohio

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/
Candice Prunner (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

July 8, 2006
(Completion Date)

APPENDIX D

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3188

[Filed March 26, 2009]

DANIEL OPOKU MENSAH,	)
	)
Petitioner	)
	)
v.	)
	)
ERIC H. HOLDER, JR., Attorney General of the United States; DEPARTMENT OF HOMELAND SECURITY,	)
	)
Respondents.	)

ON PETITION FOR REVIEW
FROM A FINAL ORDER OF THE
BOARD OF IMMIGRATION APPEALS

ORDER ON PETITION TO REHEAR

BEFORE: DAUGHTREY and MOORE, Circuit Judges; DUGGAN, District Judge.

PER CURIAM. This matter is again before the court on the petitioner's "motion for rehearing" and his additional suggestion that his case be reheard *en banc*. The petitioner contends that the panel applied the wrong standard of review in declining to overturn the order of the Board of Immigration Appeals, which affirmed the immigration judge's decision denying Daniel Opoku Mensah's application for cancellation of removal. That decision was based on the judge's determination that, *inter alia*, the petitioner had not met his burden of proving that an "exceptional and extremely unusual hardship" would result if his two children, both American citizens, were forced to return to Ghana with the petitioner and his wife. In denying review of the Board's order, we noted that the decision was not subject to review because 8 U.S.C. § 1252(a)(2)(B) "specifically divests jurisdiction of a court to review judgments regarding the granting of discretionary relief, including cancellation of removal," citing Santana-Albarran v. Ashcroft, 393 F.3d 600, 703 (6th Cir. 2005). However, as our opinion indicates, we did review each of the petitioner's individual arguments to ensure that he had not suffered a denial of due process in the procedures utilized in the immigration court and before the Board.

The petitioner faults our reliance on Santana-Albarran, contending that we should instead have invoked the rule in Billeke-Torosa v. Ashcroft,

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* The Hon. Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

385 F.3d 708 (6th Cir. 2004), that "we may review the non-discretionary decisions that underlie determinations that are ultimately discretionary." Id. at 711. Thus, the petitioner posits, we failed to "appreciat[e] this distinction and carefully review[] whether the Board evaluated in a lawful manner the severe impact that removal would have on the U.S. citizen children of Petitioner Mensah." In addition, the petitioner, now represented by new counsel, alleges that we "restricted [ourselves] to only a limited 'due process' review of Mensah's claims of error." We disagree.

First and foremost, there is no legal authority that would permit us to re-evaluate the Board's discretionary determination that a case of "exceptional and extremely unusual hardship" was not made out by the petitioner here. That determination is the very heart of the ultimate, discretionary decision under 8 U.S.C. § 1229b(b)(1)(D) that we are prohibited from reviewing under 8 U.S.C. § 1252(a)(2)(8)(1). On the other hand, we have recognized two exceptions to this prohibition, "one drawn from by the statute, one inferred from its general framework." Aburto-Rocha v. Mukasey, 535 F.3d 500, 502 (6th Cir. 2008).

> First, the statute elsewhere explicitly permits us to review "constitutional claims or questions of law." See 8 U.S.C. § 1252(a)(2)(D). Second, as the heading of the underlying provision suggests, see § 1252(a)(2)(B) ("Denials of discretionary relief"), the statute prevents us from reexamining only discretionary decisions by the agency, including discretionary denials of an application for cancellation of removal. "[N]on-discretionary decisions," by contrast, are

> within our purview, even where they "underlie determinations that are ultimately discretionary." Billeke-Tolosa v. Ashcroft, 385 F.3d 708, 711 (6th Cir.2004); see also Santana-Albarran v. Ashcroft, 393 F.3d 699, 703 (6th Cir.2005) (holding that § 1252(a)(2)(B) "divests jurisdiction of a court to review judgments regarding the granting of discretionary relief, including the cancellation of removal," but does not remove jurisdiction to review the non-discretionary fact of an alien's continuous presence in the United States).

Aburto-Rocha, 535 F.3d at 502.

Chief among the non-discretionary decisions subject to review under Aburto-Rocha is the failure of the immigration judge or the Board to follow Board precedent. See id. at 503 ("[T]he choice by the BIA to disregard its own binding precedent-even when deciding an issue that is within its discretion-is not itself a discretionary decision Congress has excluded from review.") (citing Billeke-Torosa, 385 F.3d at 711). But that limited jurisdiction "does not give us authority to second guess every choice the agency makes about how to apply uncertain or even conflicting precedents in a given context." Id. Here, although the Board did not cite specific cases in its review of the immigration judge's decision, the Board carefully considered the factors that it has previously held to be relevant to the inquiry regarding hardship to qualifying relatives, *i.e.*, employment prospects of the petitioner, threats to the children's reduced standard of living abroad, unity of the nuclear family, educational opportunities for the children, and their overall health. We find no basis on which to conclude

that the Board did not follow its own precedent in coming to the determination that the petitioner had not established a basis for cancellation of removal.

The motion to rehear is DENIED.

APPENDIX E

TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12. IMMIGRATION
AND NATIONALITY
IMMIGRATION
ADJUSTMENT AND CHANGE OF STATUS

8 U.S.C. § 1252 Judicial review of orders of removal

(a) Applicable provisions.

* * *

(2) Matters not subject to judicial review.

* * *

(B) Denials of discretionary relief. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this

title to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a).

* * *

INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

8 U.S.C. § 1229b. Cancellation of removal; adjustment of status

* * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents.

(1) In general. The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien--

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [8 USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * *